

UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Santiago Alberto Altamirano,	)	
	)	CV-08-137-TUC-DCB
Petitioner,	)	
v.	)	
	)	
Dora B. Schriro, et al.,	)	<b>ORDER</b>
	)	
Respondents.	)	
	)	
_____	)	

This matter was referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b) and the local rules of practice of this Court for a Report and Recommendation (R&R) on the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Before the Court is the Magistrate Judge's Report and Recommendation, which recommends that the Petition be denied and dismissed. The Petitioner filed Substantive Objections to the Report and Recommendation on October 14, 2008.

**PETITIONER'S OBJECTIONS**

Petitioner's sole objection is that neither the Answer nor the Recommendation addresses Petitioner's amended Ground IV on the merits: "the sentencing court abused its discretion by sentencing the Petitioner outside constitutional limits creating an illegal sentencing which constituted fundamental error, to violate Petitioner's 5th, 6th, and 14th Amendment's rights to Due Process under the United States Constitution." (Objections at 3.) The thrust of Petitioner's sentencing problem is that

1 he believes that two historical prior convictions were improperly used  
2 to enhance his state sentence. (Objections at 4.) "Because the trial  
3 court accepted defendant's guilty pleas in all three cases at the same  
4 time, none of the resulting convictions proceeded any others . . . " and  
5 hence could not be treated as historical priors. (Objections at 6.)

#### 6 STANDARD OF REVIEW

7 When objection is made to the findings and recommendation of a  
8 magistrate judge, the district court must conduct a de novo review.  
9 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

#### 10 DISCUSSION

11 Petitioner was convicted in Pima County Superior Court, case #CR-  
12 20040875, CR-20042130, and CR-20044278, of Aggravated Driving Under the  
13 Influence. He was sentenced to a 2.5-year prison term in CR-20040875 and  
14 10-year prison terms in CR-20042130 and CR-20044278; the terms in CR-  
15 20044278 and CR-20042130 were to be served consecutively. As part of the  
16 plea agreement, Petitioner admitted to two prior felony DUI convictions,  
17 CR-20040875 and CR-20040835. During the sentencing, the Superior Court  
18 found in aggravation that Petitioner had four prior felony convictions,  
19 seven misdemeanor convictions, a pattern of alcohol abuse coupled with  
20 driving which posed a risk to the community and four DUI arrests within  
21 a ten-month time period. The Superior Court found in mitigation that  
22 Petitioner had mental health problems, was a veteran, had physical health  
23 problems, had made rehabilitation efforts, had family support, that the  
24 offense was nonviolent, and that the Petitioner was remorseful. After  
25 balancing aggravating and mitigating circumstances, the Superior Court  
26 determined that the presumptive terms for sentencing were appropriate.

1 During post-conviction proceedings, Petitioner's sentence was repeatedly  
2 reviewed and upheld.

3 After a thorough analysis, the Report and Recommendation found  
4 that, "In sum, Petitioner has failed to show either that the state courts  
5 misapplied federal law or that the state courts' ruling was unreasonable  
6 based on the evidence presented. 28 U.S.C. § 2254(d)." (R&R at 11.)  
7 Contrary to Petitioner's assertions in his Objections, the Report and  
8 Recommendation specifically addresses his concerns about the sentence  
9 imposed.

10 "[A] federal court may not issue a habeas petition 'with respect  
11 to any claim that was adjudicated on the merits in State court  
12 proceedings' unless the state court decision: 1) 'was contrary to, or  
13 involved an unreasonable application of, clearly established Federal law,  
14 as determined by the Supreme Court of the United States' or 2) 'was based  
15 on an unreasonable determination of the facts in light of the evidence  
16 presented in the State court proceeding.'" *McCambridge v. Hall*, 303 F.3d  
17 24, 34 (1<sup>st</sup> Cir. 2002) (quoting 28 U.S.C. § 2254(d)). A decision is  
18 "contrary to" clearly established federal law "if the state court arrives  
19 at a conclusion opposite to that reached by [the Supreme Court] on a  
20 question of law or if the state court decides a case differently than  
21 [the Supreme Court] has on a set of materially indistinguishable facts."  
22 *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000). A decision represents  
23 an "unreasonable application" of clearly established federal law "if the  
24 state court identifies the correct governing principle from [the Supreme  
25 Court's] decisions but unreasonably applies that principle to the facts  
26 of the prisoner's case." *Id.* at 413. An "unreasonable application"  
27 requires "some increment of incorrectness beyond error . . . The

1 increment need not necessarily be great, but it must be great enough to  
2 make the decision unreasonable in the independent and objective judgment  
3 of the federal court." *McCambridge*, 303 F.3d at 36.

4       Petitioner asserts that the sentence imposed by the state court  
5 violated his Due Process rights and was greater than necessary, which  
6 deprived Petitioner of fundamental fairness. (Objections at 6.)  
7 Basically, Petitioner urges that his sentence is excessive in relation  
8 to the offenses committed. The Eighth Amendment "forbids only extreme  
9 sentences that are 'grossly disproportionate' to the crime." *Solem v.*  
10 *Helm*, 463 U.S. 277, 288 (1983). Petitioner's sentence is neither extreme  
11 nor grossly disproportionate and does not violate the U.S. Constitution.

12       Habeas review of state court sentencing determinations is only  
13 available when a Petitioner asserts that he was sentenced in violation  
14 of the Constitution and, "[n]o federal constitutional issue is presented  
15 where, as here, the sentence is within the range prescribed by state  
16 law." *White v. Keane*, 969 F.2d 1381, 1383 (2d Cir. 1992)("Sentencing  
17 decisions are not cognizable on habeas corpus review unless the sentence  
18 imposed falls outside the range prescribed by state law."). Petitioner's  
19 sentence was within the range prescribed by Arizona law, hence there is  
20 no basis for additional federal habeas review.

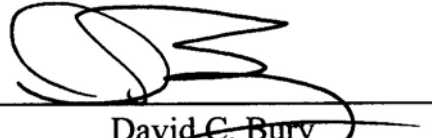
#### 21                                   CONCLUSION

22       Accordingly, after conducting a de novo review of the record,  
23       **IT IS ORDERED** that the Court **ADOPTS** the Report and Recommendation  
24 (Doc. No. 10) in its entirety. The Objections raised by the Petitioner  
25 are **OVERRULED**.

1           **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus  
2 is **DENIED** and this action is **DISMISSED** with prejudice. Final Judgment  
3 to enter separately.

4           DATED this 24<sup>th</sup> day of October, 2008.

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David C. Bury  
United States District Judge